

Request for Special Permission to Appeal ALJ's Denial of the Attached Motion to Defer

Pursuant to §102.26 the respondent respectfully requests the Board to grant special permission to appeal the ALJ's denial of its Motion to Defer because: ① as a matter of law this case is appropriate for a collar deferral; ② respondent has waived any and all obstacles to arbitration, ~~and~~ ~~requiring~~ ~~AMR~~ ~~to~~ ~~continue to litigate~~ as set forth in the Motion to Defer; ③ the Union sought postponement of the scheduled arbitration with Arbitrator Bornstein which arbitration will go forward subsequent to the ruling in these proceedings and AMR should not be subject to dual proceedings.

The reasons special permission to appeal should be granted are the same reasons the ~~appeal~~ Board should overturn the ALJ's denial of the respondent's Motion to Defer.

American Medical Response of
of Connecticut, Inc.

Dated May 3, 2012

Meredith G. Diette

Meredith G. Diette
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Supplemental to the
Special Permission to Appeal ALJ's Denial

As you consider the respondent's request ~~plea~~
it is further supported by NLRB v. Roswell, Inc d/b/a
Ramey Supermarkets, 55 F3d 382.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

AMERICAN MEDICAL RESPONSE
OF CONNECTICUT, INC.

and

ADAM CUMMINGS, AN INDIVIDUAL

Case 34-CA-013051

AMERICAN MEDICAL RESPONSE OF
CONNECTICUT, INC.

and

SHANNON SMITH, AN INDIVIDUAL

Case 34-CA-065800

MAY 3, 2012

MOTION TO DEFER

Pursuant to § 102.24 of the Rules and Regulations of the National Labor Relations Board ("Board"), American Medical Response of Connecticut, Inc. ("AMR") respectfully moves for a pre-arbitral deferral as to Case 34-CA-013051 ("the Cummings Complaint") and asks that the Board stay its consideration of the Cummings Complaint and require the parties to continue pursuing their contractually agreed upon arbitration process. As detailed herein, a pre-arbitral *Collyer* deferral is appropriate because the parties have a long and productive collective-bargaining relationship, there is no claim that the employer generally opposes its employees' exercise of protected rights, the contract provides for arbitration of a wide range of disputes, including encompassing the dispute here, the employer has expressed a willingness to arbitrate and the dispute is suited for arbitration. Accordingly, the Board should defer consideration of the

Cummings Complaint and require the parties to continue pursuing arbitration which the Union has already invoked.

I. FACTUAL BACKGROUND

By grievance dated June 15, 2011, the Union grieved AMR's decision to terminate Mr. Cummings. (NEMSA Grievance Notification Form for Claim #6972, attached hereto as Exhibit A.) By letter dated July 13, 2011, AMR denied the grievance. (July 13, 2011 letter attached hereto as Exhibit B.) Thereafter, in keeping with the parties' CBA, by letter dated July 25, 2011, the Union formally requested that the grievance be taken to mediation. (Letter re: Grievance Claim #6972 Union Mediation Request, attached hereto as Exhibit C.) Then, again in keeping with the relevant CBA procedures, by letter dated August 17, 2011, the Union formally moved the grievance onto the arbitration process. (Letter re: Move Claim #6972 to Arbitration, attached hereto as Exhibit D.)

Once moved to the arbitration process, the parties selected an arbitrator, Tom Borstein, and were scheduled to go forward with arbitration on February 13, 2012. However, and over AMR's objection, on February 1, 2012, the Union requested that Arbitrator Borstein postpone the arbitration hearing until such time as the Board ruled on the Cummings Complaint. (Request for Postponement, attached hereto as Exhibit E.)¹ The arbitrator granted the Union's request.

Although having invoked the parties' CBA grievance mechanisms, on July 20, 2011, the Union filed the Cummings Complaint with the Board. In its Amended Answer, by way of an Affirmative Defense, AMR asserted that the Cummings Complaint should

¹ Notably, in its request for a postponement, the Union stated that "[t]he N.L.R.B. hearing is currently scheduled to begin on April 2, 2012 and the N.L.R.B. has indicated that it will not be rescheduled." (Request to Postpone, attached hereto as Exhibit E.)

be deferred to the arbitral process contained in the parties' CBA. Counsel for the General Counsel did not agree with AMR's position regarding a pre-arbitral deferral.

II. ARGUMENT

A pre-arbitral deferral is warranted here, where all of the *Collyer* elements are met. As the Board notes in its pattern for a *Collyer* deferral letter:

The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

N.L.R.B. Case Handling Manual 10118.6 Pattern for Collyer Deferral Letter. In this way, pre-arbitral deferrals "resemble[] the exhaustion requirements often found in administrative regimes and the abstention doctrines employed by federal courts." *Hammontree v. N.L.R.B.*, 925 F.2d 1486, 1490 (D.C. Cir. 1991). That is, deferral is the "exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." *United Technologies Corp.*, 268 N.L.R.B. 557, 560 (1984). "The Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes." General Counsel Memorandum 12-01.

In *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the Board considered a § 8(a)(5) claim arising out of an alleged unilateral change of working conditions by an employer. The Board held that, where certain conditions are met, it would require exhaustion of arbitration remedies within the relevant CBA before it considered the complaint. *Id.* Since then, the Board has found pre-arbitral deferral appropriate in § 8(a)(1), (a)(3) and 8(a)(5) cases where: (i) there is a long-standing bargaining

relationship between the parties; (ii) there is no claim that the employer generally opposes the employees' exercise of protected rights; (iii) the employer manifests a willingness to arbitrate; (iv) the CBA's arbitration clause covers the dispute at issue; and (v) the contract and its meaning lie at the center of the dispute. See 192 N.L.R.B. at 842; see also *National Radio Co.*, 198 N.L.R.B. 527 (1972); *United Technologies Corp.*, 268 N.L.R.B. 557 (1984); 1973 General Counsel Memorandum, "Arbitration Deferral Policy under Collyer-Revised Guidelines" (May 10, 1973); Operations-Management Memo 05-77 (June 20, 2005). With regard to the Cummings Complaint, all *Collyer* elements are met and the Board should defer its consideration of the Cummings Complaint.

The first *Collyer* element, that the parties have a long-standing relationship, can not be in dispute here. That is, the relevant bargaining unit of EMTs and paramedics in the Cummings Complaint has had a long-standing, productive bargaining relationship with AMR. In fact, the bargaining unit has been represented by a Union since at least 1994. Similarly, there is no claim in the Cummings Complaint that AMR generally opposes its employees' exercise of protected rights. Moreover, given the long-standing relationship between AMR and the relevant bargaining unit, "[AMR] can hardly be characterized as displaying a deep-seated animus to its employees' union representation or disregard for its employees' statutory rights." *Appalachian Power Company*, 198 NLRB 576, 579 (1972).

As to the third *Collyer* element, AMR is willing to continue with arbitration of the Cummings Complaint. AMR expressly requested deferral in its Amended Answer to the Cummings Complaint through an Affirmative Defense. Moreover, AMR informed

Counsel for the General Counsel that it would waive any and all obstacles, including all timeliness defenses to the grievance, to arbitration. Moreover, the fourth element and fifth *Collyer* conditions are also present in the Cummings Complaint. The relevant CBA covers a broad range of grievances. Here, the Union had already invoked the arbitration process through the CBA's grievance procedures, the parties selected an arbitrator and were ready to start the arbitration hearing.

Finally, none of the factors weighing against a *Collyer* deferral are present here. That is, the Cummings Complaint does not involve any violations of § 8(a)(4), there are no allegations that AMR has failed to supply information in violation of §§ 8(a)(5) or 8(b)(3), AMR's defense is reasonably based on an interpretation of the Collective Bargaining Agreement and the Cummings Complaint does not involve the resolution of unit determination or other representation type issues. Ultimately, allowing the union to bring the Cummings Complaint before the Board instead of continuing with the arbitration proceedings it began would violate the Union's commitment to arbitrate contractual disputes. See 192 N.L.R.B. at 842.

III. CONCLUSION

For the foregoing reasons, AMR requests that its Motion to Defer be granted.

**AMERICAN MEDICAL RESPONSE OF
OF CONNECTICUT, INC.**

By: Meredith G. Diette
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Case 34-CA-065800

MAY 3, 2012

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Defer has been served by hand delivery this 3rd day of May, 2012, to the following:

Jennifer Dease, Field Attorney
National Labor Relations Board
Region 34
A.A. Ribicoff Federal Building
450 Main Street, Suite 410
Hartford, CT 06103-3022
(Jennifer.Dease@nrlrb.gov)

Jonathan Kreisberg, Regional Director
National Labor Relations Board
Region 34
A.A. Ribicoff Federal Building
450 Main Street, Suite 410
Hartford, CT 06103-3022
(Jonathan.Kreisberg@nrlrb.gov)


Meredith G. Diette



NEMSA
National EMS Association

National Emergency Medical Services Association
Grievance Notification Form

You are formally notified of a grievance filed in accordance with the Collective Bargaining Agreement. This grievance may require a grievance meeting between the Grievant and representatives of the Employer and NEMSA to discuss this grievance and attempt to obtain resolution.
Please contact the NEMSA representative/ shop steward named below to schedule a meeting date and time.

CLAIM # 6972

Filed By Bree Eichler **Title** Chief Steward **Date** 6/15/11

Contact Information: Phone: 860-944-0168 Email: BreeEichler@gmail.com

Filed On Behalf Of: Adam Cummings and all affected employees

Date Of Event(s) Causing Grievance: on or around June 3rd 2011 **Ongoing:**

Description of Grievance

Adam Cummings was terminated without just cause in violation of Article 15

Applicable Contract provisions include, but are not limited to, section(s)

Article 15.01 and all other related articles

NEMSA Requested Resolution

It is requested that Adam Cummings will return to full working duties in his appropriate shift, as well as receive all appropriate PTO and lost monies, and the employee shall be made whole in every way,

and the Employer shall immediately comply with all terms and conditions of the contract. All affected bargaining unit employees shall be made whole for any and all losses of any kind resulting from the Employer's violation of the contract, including but not limited to full back pay with interest, reinstatement of all health and welfare benefits, reinstatement of all seniority and leave benefits, and reinstatement to all work assignments. In addition, the Union shall be made whole for any and all losses resulting from the Employer's violation of the contract, including but not limited to full reimbursement for all costs, expenses and losses of any kind associated with processing this grievance through arbitration. NEMSA also requests that all affected employees and the Union be awarded any other relief that is just and proper under the contract, applicable law or in equity.

Pursuant to the employer's duty to bargain in good faith, the Association hereby requests the following information and/or documents which are necessary and relevant to process this grievance

any and all information the company received regarding alleged "work action", hearing notes recorded by Bob Zagami, Sean Piendel, and Kelly Gauthier regarding Mr Cummings hearing.

Attention Employers: Please provide a courtesy copy of all correspondence to the local NEMSA shop steward or NEMSA Representative handling this case. In ALL cases grievance correspondence should be directed to: NEMSA GAAMS, 4701 Sisk Rd STE 102, Modesto CA 95356, via Facsimile at 209-572-4721 or via email to GAAMS@NEMSAUSA.ORG. Be sure to use the above referenced grievance claim number in your correspondence. Thank You

EXA



AMERICAN MEDICAL RESPONSE

Hartford Operation

July 13, 2011

This letter is in response to the Step 2 Grievances heard during the chair car negotiations the week of June 27-July 1st.

1. Gary Hebert filed by Bree Eichler.

- a. The Union's Grievance: "Gary Hebert was terminated unjustly"
- b. The Union's requested resolution: "Gary Hebert be allowed to return to full duty as a paramedic immediately. The discipline will be removed from Gary Hebert's personal files and the employee shall be made whole in every way".

The Company's Response:

The Union did not disagree that the events that triggered Hebert's termination did in fact occur but that the union did not agree with the discipline that Hebert had received. As the Company views his actions as very serious; the termination is upheld and the Step 2 grievance as filed by the union is denied.

2. Jane Gordon filed by Adam Cummings

- a. The Union's Grievance: documented verbal warning issued for her having two "occurrences" of PTO use within 30 days of each other. Notice of absence was given to the company with more than the required amount of time
- b. The Union's requested resolution: Removal of the verbal warning from Jane Gordon's personnel file.

The Company's Response:

When researched, it was determined that she was in fact issued a verbal warning for two occurrences. She did not book off "way in advance" as had been stated, she booked off the day before. Therefore the verbal warning stands and the grievance filed by the union is denied.

3. Adam Cummings filed by Bree Eichler

- a. The Union's Grievance: "Unjust Termination"
- b. The Union's requested resolution: Reinstate Adam Cummings

The Company's Response:

As you know, on May 13, 2011, I received a letter from NEMSA Eastern States Representative Toby Sparks stating that the Union was sending the letter in order to comply with its obligations under Section 17.02 of your collective bargaining agreement ("CBA") in the event of an unauthorized work action. Subsequent communications with Mr. Sparks confirmed that the Union has determined you are engaging in, inciting and/or participating in a work action and that your conduct violates Section 17.01 of the CBA.

Therefore, the termination is upheld and the grievance filed by the union is denied.



NEMSA
National EMS Association

National Emergency Medical Services Association *Union Mediation Request*

Grievance Claim # 6972 Union Mediation Request

7/25/11
American Medical Response
Attention: Bob Zagami

RE: Grievance 6972 Mediation Request

Dear Mr. Zagami,

In accordance with the Collective Bargaining Agreement and applicable law, NEMSA formally requests that the above referenced grievance be taken to mediation in an attempt to settle this dispute. As part of the mediation process, upon signed mutual agreement of both NEMSA and the employer I propose that grievance related timelines in the CBA be extended for the express purpose of taking the aforementioned grievance to mediation. Grievance timelines will continue upon either party voluntarily withdrawing from mediation or if the mediation is concluded. Please respond in writing with your acceptance or denial of this mediation request.

Sincerely,

Shop Steward Name: Bree Eichler
Phone: 860-944-0168 / Email: BreeEichler@gmail.com

Ex C



NEMSA
National EMS Association

National Emergency Medical Services Association
Move Grievance to Arbitration

Move Claim # 6972 to Arbitration

8/17/11
American Medical Response
Attention: Robert Zagami

RE: Move Grievance 6972 To Arbitration

Dear Mr. Zagami,

In accordance with the Collective Bargaining Agreement and applicable law, NEMSA formally notifies you that the grievance listed above is being moved to Arbitration.

Sincerely,

Shop Steward Name: Jason Herring
Phone: . / Email: .

Ex D

From: Mary M. Mitchell [Mitchellm@adr.org]
Sent: Wednesday, February 01, 2012 1:01 PM
To: 'Matt Crosier'
Cc: Rowekamp, Scott; daniel@goyette-assoc.com
Subject: RE: 12 300 000419 11 Request for Postponement

Thank you for email. Scott we are asking AMR if they have a response to this request for postponement to please forward your response no later than tomorrow February 2, 2012.

The unions request and any response will be forwarded to the arbitrator for his decision.

Thank you for your prompt attention to this matter

Mary

Mary Mitchell | Labor Case Manager | American Arbitration Association | Boston, MA | Direct: 617-695-6033 | Fax: 617 451 0763 Email: Mitchellm@adr.org website: www.adr.org This e-mail communication (and/or the documents accompanying such) is confidential and is intended only for the individuals or entity named above and others who have been specifically authorized to receive it. If you are not the intended recipient, please do not read, copy, use or disclose the contents of this communication to others. Please notify the sender that you have received this e-mail in error by replying to the e-mail or by telephoning 617-451-8600 during the hours of 8:30 A.M.-5:00 P.M. (eastern time). Please then delete the e-mail and any copies of it. Thank you
Did you know the American Arbitration Association has handled all types of Elections across the country? If you have questions on how the AAA can administer your next election please contact me for more information at (Mary Mitchell 617 695 6033 or Mitchellm@adr.org) or follow this link at <http://www.adr.org/elections>.

WEBINARS NOW AVAILABLE!

If you'd like to be added to the AAA's email distribution list for the Labor and Employment Newsletter, please email: LRENNewsletter@adr.org.

From: Matt Crosier [mailto:mcrosier@talbotlawgroup.com]
Sent: Wednesday, February 01, 2012 12:56 PM
To: Mary M. Mitchell
Cc: Scott Rowekamp (Scott.Rowekamp@emsc.net); daniel@goyette-assoc.com
Subject: Re: 12 300 000419 11 Request for Postponement

Dear Mary,

Attached is a request for postponement in the case identified above. Please let me know if you have any questions or concerns regarding this request. Thank you.

Matthew A. Crosier
Talbot Law Group
A Professional Corporation
105 E Street, Suite 2E
Davis, CA 95616
(530) 792-7211 voice
(530) 792-8891 fax

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EXE

February 1, 2012

VIA SUBMISSION TO THE AMERICAN ARBITRATION ASSOCIATION

Arbitrator Tim Bornstein
58 Beaver Pond Road
Lincoln, MA 01773

Re: 12 300 000419 11 - National Emergency Medical
Services Association and American Medical Response
(Termination of Adam Cummings)
Request for Postponement of Arbitration Hearing

Dear Arbitrator Bornstein:

The National Emergency Medical Services Association
("NEMSA") has asked this office to request a postponement of the
arbitration hearing for the above-referenced case, which is currently
scheduled for February 13, 2012.

The arbitration case concerns the termination of AMR employee
Adam Cummings under the applicable CBA. However, Mr. Cummings'
termination is also the subject of a pending hearing before the National
Labor Relations Board ("NLRB"). The NLRB hearing involves unfair
labor practice charges filed by Mr. Cummings against both American
Medical Response and NEMSA. The NLRB issued a complaint and is
seeking Mr. Cummings' reinstatement and back-pay, which are also the
remedies available to him through arbitration. The NLRB hearing is
currently scheduled to begin on April 2, 2012 and the NLRB has
indicated that the hearing will not be rescheduled.

In light of the pending NLRB hearing, NEMSA requests that the
arbitration hearing be postponed indefinitely and resumed only after
resolution of the NLRB complaint. The need for an arbitration hearing
may be obviated by a decision resolving the NLRB complaint and render
the underlying grievance moot. By contrast, even if a decision is reached
in the arbitration prior to April 2, 2012, which is unlikely, such a decision
will not resolve the unfair labor practice charges underlying the NLRB's
complaint. Proceeding with the arbitration prior to the NLRB hearing also
presents certain potential conflicts of interest that can be avoided by
resolution of the NLRB complaint prior to proceeding with the arbitration.

NEMSA has spoken with AMR about this request, but AMR is not
amenable to a postponement based on the claim that "any number of
matters at issue in the ULPs [...] may be resolved or informed by the
evidence adduced at the arbitration." Despite AMR's apparent desire not
to postpone the arbitration hearing, AMR will not suffer any harm or
prejudice by postponing the arbitration. As the party initiating this



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Tim Bornstein

Case 12-300 000419 11

Request for Postponement of Arbitration Hearing

February 1, 2012

Page 2 of 2

request, NEMSA is willing to bear the full cost of the arbitrator's cancellation fee as a result of postponing this matter.

Given the short time remaining before the arbitration hearing in this matter, NEMSA respectfully requests that the arbitrator render a decision on this request as quickly as possible. Please contact our office if you have any questions or concerns regarding this request. Thank you for your time and assistance.

Sincerely,



Matthew A. Crosier



cc:

Scott Rowekamp (via email)

Dan Thompson (via email)